E-Discovery: Traps for the Unwary

By Jonathan W. Brogan, Esq. We all live in an information exploded age. E-mail, social media, computer files and records, satellite tracking systems, and video are a daily part of all of our lives. Because they are a part of all of our lives, they have now become an integral part of the discovery process and a potential tool for plaintiffs' attorneys with weak cases to try to trap unwary small businesses and even potential defendants in simple automobile or premises liability cases. More and more potential defendants in litigated matters are receiving, along with a notice of claim, a letter from a plaintiff's attorney asking that a "litigation hold" be placed on all of their electronic information and files. This article will deal with some of the state and federal rules associated with the production of these documents, the potential penalties for not protecting these documents, and the practicalities of electronic discovery in Maine. The Maine Rules of Civil Procedure and the Federal Rules of Civil Procedure differ substantially, now, on the issue of what is "discoverable". Under the Federal Rules of Civil Procedure, Fed.R.Civ.P. 26(b)(1), the scope of discovery is:

Parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the party's relative access to the relevant information, the party's resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

This discovery rule, adopted in 2015, changed what had been the scope of discovery for more than 40 years. In Maine, however, the old scope of discovery still exists. Maine Rule of Civil Procedure 26(b)(1) states that:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter . . . and appears reasonably calculated to lead to the discovery of admissible evidence.

Under the Federal Rules, if substantial electronic information is sought, an e-discovery order is usually entered and the division of costs associated with the discovery is evaluated. Unfortunately, in Maine, given the limited resources of our courts, it is a much less regulated process. Litigation holds are often used in significant products liability or other commercial cases involving large corporations with legal departments and guidelines regarding litigation holds. This article will not address those situations. The article is focused on local businesses and events that may result in litigation. What does the small company do when it receives the boilerplate "litigation hold" letter? Also, what does a non-commercial driver involved in an automobile accident, for which he has insurance, do when he receives the same litigation hold letter? Under the Federal Rules, the issue of proportionality is important. Although the State Rules have not adopted proportionality, yet, but clearly that issue may be brought to the attention of the Superior Court Judge and the issue of the relevance of the potential plaintiff's attorney's request for extensive personal information on handheld devices or home computers can be addressed. The best way to address it is to first try to protect as much information as possible, document what was done to protect it and do it immediately. Once that information is protected and available, then whether or not it will ever be produced is easier to evaluate. But what happens when the potential defendant is contacted years after an accident? Maine has a 6 year statute of limitations. Many times the person is not contacted about potential litigation in an accident until years later. As

most know, many electronic devices have automatic purging and/or the people who own those devices do their own deletions. That issue is dealt with by both the Federal Rules and the State Rules under Rule 37 and typically it must be shown that there was some intent to deprive the other side of information before any sanctions result. The more difficult issue is once a person is put on notice what sources of information should be protected. Typically a litigation hold letter is general by nature and is attempting to put as wide a hold on electronic documents as possible. One thinks immediately of cell phone records, computer records, video records (surveillance or otherwise), and social media postings as information that should be requested or segregated so as to protect them from routine or inadvertent destruction. But, in many cases, there are other forms of information that small business owners forget may be the focus of the plaintiff's later motions for sanctions. For instance, many businesses that use motor vehicles have satellite tracking systems. Satellite tracking systems have become more and more sophisticated and offer the subscribers a wealth of information about the vehicles that are being tracked. That information includes the vehicles' locations, their average speeds, whether someone is abusing the vehicle by speeding or otherwise, and specific information at or near the time that a motor vehicle accident has occurred. Small businesses use this information to help them control costs and work with their employees to be safe. Plaintiffs' attorneys use this information to try to extract potential damaging data about the driver's lack of care and the owner's failure to monitor its driver. Once one determines a satellite tracking system exists, gather all the information available and store it safely. Many times the satellite tracking data is stored in the cloud and destroyed after a period of time (typically one year) to allow other information to be stored. If a small business using a satellite tracking system is not aware of the numerous sources of information that might be available to a plaintiff's attorney, it may simply overlook this electronic data. If it does, a later sanctions request may mean that the jury is instructed that information was destroyed that may have been damaging to the liability defense of the defendant. Needless to say any jury hearing that information was "destroyed" will begin to think that the defendant had something to hide and that the information would have hurt the defense and helped the plaintiff. Social media is even more difficult to control. Potential defendants have an ability to destroy any defenses in a case with their Facebook postings or tweets. Many times they believe they are protecting themselves by going on social media and explaining "their side of the story". It must be impressed upon potential defendants that they need to stay off social media and not discuss potential litigation or their defenses. If a "litigation hold" letter is sent to a defendant, then their social media information should be segregated and the defendant should be told that neither he nor any of his employees should be on social media discussing this potential matter or anything about it. If contacted about it, they should simply not respond. If someone makes an accusation that they believe they need to defend, they should abstain. There are numerous vendors who may be of help in protecting potential electronic information for discovery. They are expensive but can be extremely helpful especially when the information sought is "metadata" or other information that is typically beyond the expertise of insurance professionals, lawyers, or defendants. An analysis of when an electronic discovery vendor is useful should be made between the insurance professional and their attorneys. In conclusion, the most important thing for potential defendants and insurance professionals to do when confronted with a "litigation hold" letter is to react and respond. Identify the information that may be available, segregate that information immediately, request any information (including cell phone information or other information from outside agencies) as soon as possible and store that information. If there is video, surveillance or otherwise, immediately segregate it. When investigating an accident, identify what video sources are available, whether there were cameras on the motor vehicles or at the area where the alleged slip and fall or other accident took place, and protect it. If the motor vehicles involved have satellite tracking systems, find out what the satellite tracking systems provide, contact the satellite tracking system providers and get that information and save it.

Computer information should be saved and protected and stored. Find out from the potential defendant what routine destruction systems they have on their computers so that information is not destroyed unwittingly. Most importantly, if the “litigation hold” letter received is prior to the start of litigation, ask the requesting lawyer to provide more specific requests than are typical. Many times plaintiffs’ attorneys imagine they have asked for information that no reasonable person would see within a request. They then use that request to try to elicit sanction orders from the court. Though they are typically unsuccessful, it is easier to simply ask the plaintiffs’ lawyers what they are looking for and determine if that request is a reasonable request. E-discovery is a trap for the unwary. Reasonable reaction, and documentation, as a response to a “litigation hold” letter will help prevent sanctions later.